IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and JILL MEADOWS. M.D., Petitioners, v. TERRY E. BRANSTAD ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE081503 **RESISTANCE TO PETITIONERS' MOTION FOR TEMPORARY INJUNCTIVE RELIEF AND SUPPORTING BRIEF**

COME NOW Respondents Terry E. Branstad ex rel. State of Iowa and Iowa Board of Medicine, and in support of their Resistance to Petitioners' Motion for Temporary Injunctive Relief state as follows:

INTRODUCTION

The State of Iowa has a legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn. In furtherance of this interest, the Iowa Legislature approved proposed Iowa Code section 146A.1 as part of Senate File 471 on April 18, 2017. This informed consent requirement regulates physicians who perform abortions. It does not prohibit any abortion, nor does it impose any obligation on women who seek abortions. Rather, the informed consent requirement ensures that women who seek abortions are given adequate information about their own pregnancy, the options relative to their pregnancy, and the risks attendant to an abortion, and are given adequate time to make an informed decision. By requiring physicians to obtain written certification that a woman seeking an abortion has been provided with the

information specified in the proposed section, the State is able to promote from the outset of the pregnancy its recognized interests in protecting the health of the woman and the life of the unborn child. Petitioners seek to temporarily enjoin the informed consent requirement, arguing that the law will make it difficult for them to schedule patients' abortions 72 hours after they have obtain the written certification.

TEMPORARY INJUNCTION STANDARD

An injunction is an "extraordinary remedy" that should not be granted unless "clearly required to avoid irreparable damage." *Planned Parenthood of Mid-Iowa v. Maki*¸ 478 N.W.2d 637, 639 (Iowa 1991). The court must "carefully weigh the relative hardship which would be incurred by the parties upon the award of injunctive relief." *Maki*, 478 N.W.2d at 639 (citing *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 208 (Iowa 1980)). The Iowa Supreme Court has "repeatedly emphasized that the issuance or refusal of a temporary injunction is a delicate matter—an exercise of judicial power which requires great caution, deliberation, and sound discretion." *Kleman v. Charles City Police Dept*., 373 N.W.2d 90, 96 (Iowa 1985). Perhaps most important, "[a]n injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be doubt, which has not been settled by the law of this state." *Iowa State Dept. of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979) (quoting *Kent Products v. Hoeph*, 61 N.W.2d 711, 714-15 (Iowa 1953)).

A court may issue a temporary injunction when "the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the

plaintiff." Iowa R. Civ. P. 1.502(1). The party requesting the injunction has the burden to establish a factual basis for its issuance. *Kleman*, 373 N.W.2d at 95.

The standards for considering a request for a temporary injunction are similar to those for permanent injunctions. *Max 100 L.C. v. Iowa Realty Co., Inc.*, 621 N.W.2d 178, 181 (Iowa 2001). To prove that they are entitled to a temporary injunction, Petitioners must show (1) that in the absence of the injunction they will suffer irreparable harm, (2) that they are likely to succeed on the merits, and (3) that injunctive relief is warranted considering the circumstances confronting the parties and "balance[ing] the harm that a temporary injunction may prevent against the harm that may result from its issuance." Id. The showing that Petitioners must make here is especially onerous, as a strong presumption of validity protects statutes from constitutional challenges. *Miller v. Iowa Real Estate Commission*, 274 N.W2.d 288, 291 (Iowa 1979).

DISCUSSION

I. Petitioners' Standing

In Iowa, the standing requirement consists of two elements: (1) the petitioner must have a specific personal or legal interest in the litigation, and (2) the petitioner must be injuriously affected. *See Godfrey v. State*, 752 N.W.2d 413, 417-18 (Iowa 2008). It is important to note that the injury cannot be "conjectural" or "hypothetical," but must be "concrete" and "actual or imminent." *Id.* at 423. In this case, the petitioners allege that they are abortion providers subject to the new informed consent requirement, and they are subject to licensee discipline for noncompliance with the requirement. For purposes of this Resistance, the State recognizes that the United States Supreme Court has allowed physicians who perform abortions to challenge the constitutionality of a statute regulating

abortion based on the right of his patients to obtain one. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 118 (1976).

Petitioners here seek not only to test the constitutionality of the informed consent requirement, but to enjoin its operation while they do so. Injunctive relief will only be granted if the "*requesting party* has no adequate relief at law and will incur irreparable damage." *Nelson v. Agro Globe Engineering, Inc.*, 578 N.W.2d 659, 662 (Iowa 1998). Justice Thomas's dissent in *Whole Woman's Health v. Hellerstedt*, while addressing standing in general, is especially salient to a request for a temporary injunction:

> The central question under the Court's abortion precedents is whether there is an undue burden on a woman's access to abortion. But the Court's permissive approach to third-party standing encourages litigation that deprives us of the information needed to resolve that issue. Our precedents encourage abortion providers to sue—and our cases then relieve them of any obligation to prove what burdens women actually face.

136 S. Ct. 2292, 2323 (2016) (Thomas, J., dissenting) (internal citation omitted). In this case, because the *requesting party*—Petitioners—cannot show that they will be irreparably harmed by the informed consent requirement, they attempt to obtain an injunction based on speculation and conjecture concerning the burden placed on hypothetical Iowa women and Petitioners' own business decisions.

II. Irreparable Harm

In their Motion for Temporary Injunction and supporting affidavits, Petitioners allege that women seeking abortions in Iowa will suffer irreparable harm in the absence of an injunction due to delayed access, potentially increased costs, and the possibility that they will have to undergo a surgical, rather than a medication, abortion. It is important to note that the informed consent requirement does not prohibit any abortion. Nor does it

regulate where Petitioners can perform abortions, provide ultrasounds, or see patients. It does not demand an increase in the cost of a procedure, nor does it mandate that a woman travel to meet the requirement. Rather, it requires that the woman seeking an abortion be fully informed of the options relative to pregnancy and the risks associated with abortion. To the extent that Petitioners already provide a "comprehensive informed consent process" and perform ultrasounds prior to an abortion, they have not shown that anyone will be irreparably harmed by the informed consent requirement. See Meadows Aff. ¶¶ 8-9.

To the extent that Petitioners rely on extra delays due to their own inability to schedule timely procedures, increased travel time and cost, and the necessity of substituting a surgical for a medication abortion, their claims are overly speculative. The informed consent requirement does not demand that a woman seeking an abortion travel to Petitioners' clinics to receive an ultrasound or any of the required information. Petitioners' patients already have to schedule appointments and arrange travel to Petitioners' clinics for surgical abortions, and the new law does not make such arrangements more difficult.

For example, the affidavit of Jill Collins, Petitioners' Exhibit 3, examines the added financial burden of a hypothetical woman traveling to Des Moines from either Ottumwa or from Sioux City. The affidavit assumes that the woman will travel twice to Des Moines in order to receive informed consent and the abortion, rather than once. Petitioners do not, however, allege that their hypothetical woman would be unable to obtain informed consent from a facility that performs ultrasounds in Ottumwa or Sioux City, nor do they allege that the law prohibits them from providing ultrasounds in those

locations. Thus it is unclear from the affidavit why Petitioners believe two trips to Des Moines would be necessary under the informed consent requirement. Petitioners have thus failed to meet their burden to show that an injunction is "clearly required to avoid irreparable damage." *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995) (quoting *Maki*, 478 N.W.2d at 639).

III. Likelihood of Success on the Merits

Petitioners are not likely to succeed on the merits of their petition as the informed consent requirement is a valid and reasonable exercise of the legislature's authority and serves the State's "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Planned Parenthood of Southeastern Pennsylvania v. Casey*¸ 505 U.S. 833, 846 (1992); accord *Planned Parenthood of the Heartland v. Iowa Board of Medicine*¸ 865 N.W.2d 252, 263 (Iowa 2015) (recognizing "the state's 'important and legitimate interests in preserving and in protecting the health of the pregnant woman' and 'in protecting the potentiality of human life.'") (quoting *Roe v. Wade*¸ 410 U.S. 113, 162 (1973)).

A. Strict Scrutiny Does Not Apply

Petitioners argue that strict scrutiny applies to this challenge, despite that the Iowa Supreme Court has already declined to adopt a strict scrutiny analysis in this context, instead applying the undue burden test from *Casey*. *Planned Parenthood of the Heartland*¸ 865 N.W.2d at 262-63. In support of their contention, Petitioners rely on *McQuistion v. City of Clinton*¸ 872 N.W.2d 817 (Iowa 2015), decided several months after *Planned Parenthood of the Heartland*¸ for the proposition that the Iowa Constitution "guarantees a fundamental right to procreate." Motion for Temporary Injunction ¶ 8.

Even under Petitioners' reading of *McQuistion*, they have not shown that this challenge merits strict scrutiny. In that case, the Court counsels that "[n]ot every government action that relates in any way to a fundamental liberty must be subjected to strict-scrutiny analysis … Instead, the alleged infringement is unconstitutional only when it 'has a direct and substantial impact' on the fundamental right … Reasonable regulations that do not directly and substantially interfere with the right may be imposed." *McQuistion*, 872 N.W.2d at 833. Because the informed consent requirement does not directly or substantially interfere with a woman's right to choose an abortion, it is not subject to strict scrutiny.

B. The Undue Burden Standard Applies

Rather, as the Iowa Supreme Court has recognized, the State may exercise its regulatory authority "in the furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn," so long as it "has a rational basis to act, and it does not impose an undue burden." *Planned Parenthood of the Heartland*, 865 N.W.2d at 263 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007)). Under this approach, the Court will "weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation." *Id*. (quoting *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014)).

Applying the undue burden standard, courts have upheld informed consent statutes that require certification like that contained in the challenged law, including the United States Supreme Court in *Casey*. See, e.g., *Casey*, 505 U.S. at 885-87; *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 689-93 (7th Cir. 2002)

(reversing a pre-enforcement injunction of a statute that had the effect of requiring two visits to a clinic in order to obtain an abortion); *Karlin v. Faust*¸ 188 F.3d 446, 471-75 (7th Cir. 1999) (upholding a 24-hour waiting period law against a constitutional challenge under the undue burden standard, noting the legitimate state interest in potential life at the outset of a pregnancy); *Planned Parenthood, Sioux Falls Clinic v. Miller*¸ 63 F.3d 1452, 1467 (8th Cir. 1995) (upholding a 24-hour waiting period despite that only one doctor in the state performed abortions); *Eubanks v. Schmidt*¸ 126 F. Supp. 2d 451, 456-57 (W.D. Ky. 2000) (upholding a 24-hour waiting period and noting that the requirement only marginally made abortions more difficult to obtain and did not fundamentally alter any preexisting burdens facing poor women distant from providers); *Pro-Choice Mississippi v. Fordice*¸ 716 So.2d 645, 655-56 (Miss. 1998) (upholding a 24-hour waiting period and holding that it serves a legitimate state interest in ensuring that a woman can make a more informed decision).

In fact, the United States Supreme Court upheld a 24-hour waiting period despite findings by the district court that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24–hour waiting period will be 'particularly burdensome.'" *Casey*, 505 U.S. at 886. As the Court recognized in *Casey*¸ "[b]ecause the informed consent requirement facilitates the wise exercise of [the right to an abortion], it cannot be classified as an interference with the right *Roe* protects. The informed consent requirement is not an undue burden on that right." *Id*. at 887. At bottom, Petitioners challenge the simple fact that after giving informed consent, a woman must wait 72 hours prior to obtaining an abortion because Petitioners want to claim a

right to abortion on demand. "Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand. Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State." *Casey*, 505 U.S. at 887. It is interference *by the State* that is important, not the constraints placed on access by Petitioners own business decisions.

C. Intermediate Scrutiny Does Not Apply

Petitioners also allege that their challenge merits intermediate scrutiny because the informed consent requirement "facially discriminate[s] against women." Motion for Temporary Injunction ¶ 21. This is not correct, and Petitioners do not identify any authority supporting applying intermediate scrutiny to an informed consent requirement. The challenged law regulates physicians who perform abortions, not women who seek them. While the informed consent requirement may affect women who seek abortions, the Iowa Supreme Court has made clear that "any equal protection claim … requires an allegation of disparate treatment, not merely disparate impact." *King v. State*, 818 N.W.2d 1, 24-25 (Iowa 2012). Moreover, the Iowa Supreme Court has never held that regulations targeting physicians who provide abortions are subject to intermediate scrutiny, and such an argument is unavailing at the temporary injunction stage. *Hertko*, 282 N.W2.d at 751 ("An injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law … which has not been settled by the law of this state.").

IV. The Balance of Harms Favors the State

Petitioners allege that the State will not be harmed by an injunction because they already provide informed consent to their patients prior to performing abortions. Motion

for Temporary Injunction ¶ 25. As explained above, however, the State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. It is not for Petitioners to decide whether a duly enacted statute serves these important State interests, nor is it for them to decide whether their procedures are adequate to effect them.

When a constitutional challenge to a statute is made, "a strong presumption of validity exists." *Miller v. Iowa Real Estate Commission*, 274 N.W2.d 288, 291 (Iowa 1979). Petitioners have not met their burden to prove their entitlement to a temporary injunction, and the State will suffer significant harm if this presumption of validity is turned on its head as a result of Petitioners allegations. Petitioners have an opportunity to develop a record to support their challenge through the litigation process, and are not entitled to injunctive relief at this stage.

CONCLUSION

Grant of a temporary injunction is an extraordinary equitable remedy. Petitioners simply have not met their burden to prove that they are entitled to such relief. The State respectfully requests that Petitioners' Motion for Temporary Injunctive Relief be denied.

Respectfully submitted,

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